IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 146 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAYAK PRAHLADBHAI BHOGILAL

Versus

STATE OF GUJARAT

Appearance:

MR PK JANI for Petitioner

MR DP JOSHI ASSTT. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 18/08/2000

CAV JUDGEMENT

This is a Criminal Revision Application under Sec.401 read with Sec.397 of the Criminal Procedure Code, 1973 (for short "Cr.P.C.), filed by the original accused of Criminal case, Chief Case No.35 of 1985 pending on the

file of the learned Chief Judicial Magistrate, Mahesana (who will be referred to hereinafter as the "learned Magistrate" for the sake of convenience, challenging the correctness, legality and propriety of Judgment Ex.9 rendered by the learned Additional Sessions Judge, Mahesana (who will be referred to hereinafter as "learned Appellate Judge" for the sake of convenience in Criminal Appeal No.5 of 1990 on 20th April, 1990, whereby the learned Appellate Judge was pleased to confirm the judgment Exh.49 and order of conviction and sentence rendered by the learned Magistrate on 26th December, 1989 in Chief Case No.35 of 1985. The learned Magistrate convicted the accused for an offence punishable under Sec.408 of Indian Penal Code (for short "I.P.Code") and sentenced to suffer Rigorous Imprisonment for one year and to pay a fine of Rs.5,000/-, I/D to further undergo Simple Imprisonment for six months.

Here in this Criminal Revision Application, the original petitioner was the accused in Chief Case No.35 of 1985, whereas the revision opponent i.e. the State of Gujarat was the prosecution in that case before the trial court, and therefore, for the sake of convenience, the parties will be referred to hereinafter as the complainant, accused and prosecution respectively at appropriate stages.

2. The facts leading to this Criminal Revision Application, in a nutshell, are as follows:-

During the period from 1/7/1984 to 18/10/1984, the accused was serving as the Secretary i.e. paid employee in Sokhada Seva Sahakari Mandali of village Sokhada, Tal. Vijapur, Dist. Mahesana (in short "Mandali"). It is the case of the prosecution that it was one of the duties of the accused as the Secretary of the said Mandali to keep and maintain the books of account of the Mandali and also to keep cash of the Mandali with him. According to the Rules of the Mandali, the Secretary was authorised to keep on hand a cash of only Rs.1,000/- and he was also duty bound to deposit an excess amount of the Mandali over Rs.1,000/- in the account of the Mandali with the Bank.

On or about 11-10-1984, the accounts of the Mandali were inspected by one Bhikhabhai Mangaldas Patel -the Supervisor of Mahesana District Sahakari Bank, Vijapur Branch, Vijapur, and during the course of inspection, it was revealed that as on 29/9/1984, Prahladbhai Bhogilal i.e. accused in his capacity as the Secretary had kept on hand cash exceeding Rs.1,000/-. As

per the case of the prosecution, on 29/9/1984, the accused had kept with him a hard cash of Rs.46,907-39 Ps. as appeared in the Rojmel on 29th September, 1984. Thereupon the accused explained that he had misappropriated that amount for his own use and he would return the said amount within a period of 15 days. The accused also made a statement to this effect which is at Ex.21. It is further the case of the prosecution that on 23/11/1984, the accused returned Rs.2,400/- and on 24/11/1984, he returned Rs.5,000/- to the Mandali, but he failed to make the payment of remaining amount. The Supervisor who inspected the books of account of the Mandali made his report to his Head Office in this regard. The Head Office of the Bank, in turn, reported this matter to the District Registrar, Co-operative Societies, Mahesana. Thereafter, one Purshottambhai Manilal Patel who was the then working as a Co-operation Officer (Consumer) in the Office of the District Registrar, Co-operative Societies, Mahesana, filed a complaint against the accused on 24/3/1985 in Vijapur Police Station. As per that complaint, the accused had misappropriated a sum of Rs.46,907-39 Ps. being a property of the Mandali for his own use, and thereby, the accused has committed an offence of criminal breach of trust in respect of aforesaid amount which was entrusted to him by the Mandali. That complaint came to be registered as CR.NO. I 130/85 in Vijapur Police station against the accused. The Police investigated the case registered on the basis of the complaint lodged against the accused, and ultimately, the Police filed a chargesheet against the accused for an offence punishable under Sec.408 of I.P.Code in the Court of the learned Judicial Magistrate, First Class, Vijapur. It appears that as the amount involved in the case was more than Rs.10,000/-, that case was transferred to the Court of the learned Chief Judicial Magistrate, Mahesana (who will be referred to hereinafter as the learned Magistrate for the sake of convenience) who conducted the case from the very beginning to end.

He framed a charge Exh.6 against the accused for an offence punishable under Sec.408 of I.P.Code. The accused pleaded not guilty to the charge. The prosecution examined four witnesses in the case. The prosecution also produced and proved the documentary evidence in support of their case. On evidence being declared as closed by the prosecution, the learned Magistrate recorded further statement of the accused under Sec.313 of Cr.P.C. The accused has denied the entire prosecution case. During his further statement recorded under Sec.313 of Cr.P.C. he has admitted that

he had been working as the Secretary of the Mandali for last three years, and it was his duty to keep and maintain the accounts of the Mandali. He also admitted that the accounts of the Mandali were inspected on 11/10/1984, but according to him, it was the duty of the President to keep the hard-cash of the Mandali on his hand, and his (accused) responsibility for cash was a limited only to the extent of Rs.1,000/-. He has admitted that he returned Rs.2,400/- on 23/11/1984 and Rs.5,000/- on 24/11/1984, and said amounts were given to him by the President for crediting the same in the account of the Mandali. About his confession Ex.21, it is his case that the statement was extorted from him. He has his defence that there was a practice that he was signing the blank vouchers and the President has misused the sum and fabricated false voucher against him. According to him, the then President -Ishwarbhai Kacharabhai was responsible for the said amount having been misappropriated.

The accused examined one Kanjibhai Madhabhai Patel as his defence witness at Ex.45. That witness for and on behalf of the accused has given his evidence to the effect that formerly he worked as the President of the Mandali for one year during which it was the duty of the President to keep cash with him. He has also deposed to the effect that during his tenure, he found the work of the accused, satisfactory.

3. The learned Magistrate, thereafter heard the arguments of the learned advocates of both the parties. And thereafter, on perusal of the record and proceedings of the case, and after appreciating the evidence, the learned Magistrate has come to the conclusion that case against the accused for an offence punishable under Sec.408 of I.P.Code is proved beyond reasonable doubt, and therefore, by rendering his Judgment dt. 26/12/1989 in Criminal Case No. 35 of 1985, the learned Magistrate convicted the accused for an offence punishable under Sec.408 of I.P.Code, and after hearing the accused on the point of quantum of sentence, he sentenced the accused to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.5,000/- and I/D to further undergo Simple Imprisonment for one month.

4. Being aggrieved against and dissatisfied with the said Judgment and order of conviction and sentence, the accused preferred Criminal Appeal No.5 of 1990 in the Sessions Court at Mahesana. That appeal was heard by the learned Appellate Judge. He heard the arguments of the learned advocates for both the parties. And after

perusal of the Record and Proceedings of the case, and after reassessing the evidence, he was pleased to come to a conclusion that the learned Magistrate has not erred in holding that the accused has misappropriated a sum of Rs.46,907-39 ps. for his own use, out of which Rs.7400/has been returned by the accused to the Mandali, and thereby, by rendering his Judgment Ex.9 dated 20th April, 1990, the learned Appellate Judge dismissed the appeal of the accused preferred by him, and confirmed the Judgment and order of conviction and sentence rendered by the learned Magistrate.

Being aggrieved against and dissatisfied with the said Judgment rendered by the learned Appellate Judge, the accused has preferred this Criminal Revision Application and challenged the correctness, legality and propriety of the said order of the learned Appellate Judge.

5. I have heard Shri P.K.Jani, the learned advocate for the revision petitioner, and Shri D.P.Joshi, the learned APP for the State i.e. revision opponent.

6. Shri P.K.Jani, the learned advocate for the revision petitioner has argued that the accused has been convicted for an offence punishable under Sec.408 of I.P.Code. An offence under Sec.408 of I.P.Code is an offence for criminal breach of trust committed by a clerk or a servant, and therefore, here in this case, offence for the accused is for a criminal breach of trust. Now that criminal breach of trust is defined under Sec.405 of I.P.Code and according to Section 405 of I.P.Code, following ingredients are required to be proved by the prosecution:-

(i) Entrusting any person with property or with any dominion over property;

(ii) that person entrusted-

(a) dishonestly misappropriating or converting to his own use that property; or

(b) dishonestly using or disposing of that property or wilfully suffering other person so to do in violation.....

(i) of any direction of law prescribing mode in which such trust is discharged; or

(ii) of any legal contract mainly touching the discharge of such trust.

On citing this section 405 of I.P.Code, Shri P.K.Jani, the learned advocate for the revision petitioner has vehemently argued that in this case, the prosecution has not proved important ingredient of "dishonestly misappropriating or converting to his own use an amount of Rs.46,907-39 Ps.". He has attacked on the judgment of the learned Appellate Judge on the ground that the learned Appellate Judge has missed to consider the fact that by mere proving entries from the books of account of the Mandali, no "dishonest intention" can be inferred. It is his argument that in this case, looking to the entries made by the accused in the books of account of the Mandali, it can be said that the accused had no dishonest intention to misappropriate the money. It is his argument that had the accused an intention of misappropriation, he would not have made such type of entries in the books of account of the Mandali. His main thrust of arguments is to the effect that looking to the entries made in the books of account of Mandli, at the best, the accused can be said to be a debtor to the Mandali and it was his civil liability to return that amount. He has drawn attention of this court to the fact that the accused has also returned Rs.7,400/- to the Mandali by two items and therefore, considering the entire case of the prosecution by keeping in mind the evidence on record, it can be said that the prosecution has failed to prove the dishonest intention on the part of the accused. He has further argued that looking to Section 405 of I.P.Code which is also one part of Section 408 of I.P.Code, the prosecution must prove beyond reasonable doubt that the accused misappropriated the amount dishonestly, and therefore, he has summoned up his arguments by arguing that main ingredient of dishonest intention is not proved in this case, and therefore, the accused be acquitted from the case.

7. He has alternatively argued that for a moment, if this court comes to a conclusion that the judgment of the learned Appellate Judge is according to law, then the accused may be given benefit of probation under Sec. 360 of Cr.P.C. For basing this prayer for benefit of probation, he has argued that the office bearers of the Mandali are now no more interested to see that the accused is sent behind the Bars. He has argued that practically this offence has been compounded by the office bearers of the Mandali with the accused, and therefore, now no purpose would be served, if the accused is sent to Jail.

8. Shri D.P.Joshi, the learned APP for the revision opponent, has vehemently argued that there can not be any direct evidence to prove the dishonest intention because it is mental phenomenon of the accused and he is the best person to say as to under what circumstances or with what intention, he utilised that amount for his own use, and one cannot go behind the mind of the accused. To prove an intention of the accused, one must look to the facts and circumstances of the case under which such an offence was committed by the accused, and through that facts and circumstances, one can say that the accused has dishonest intention to misappropriate the amount of Mandali or not.

9. Shri D.P.Joshi has argued that word "dishonestly" is defined under Sec.24 of I.P.Code Section 24 of I.P.Code reads as follows:-

Sec.24- "Dishonestly".

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

The expressions "wrongful gain" and "wrongful loss" are defined under Sec. 23 of I.P.Code which reads as follows-

Sec.23: "Wrongful gain"

"Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled,

and "Wrongful Loss "- is the loss by unlawful means of property to which the person losing it is legally entitled.

In third part of Sec.23 of I.P.Code, "gaining wrongfully" and "losing wrongfully" are defined.

"Gaining wrongfully" is defined as follows-

" A person is said to gain wrongfully when such person retains wrongfully, as well as such person acquires wrongfully.

"Losing wrongfully" is defined as follows-

"A person is said to loss wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property".

If we read Section 24 which defines "dishonestly" together with Sec.23 of I.P.Code, it can be said that if a person who is not legally entitled to gain the property gains such property by unlawful means, then it can be said that he does this act of wrongful gain with an intention of causing wrongful loss to another person i.e. the Mandali in the present case, and therefore, as per the arguments of Shri D.P.Joshi, when an accused was entrusted with books of account of Mandli together with hard cash of the Mandali on hand, and more particularly, when he was authorised to keep a cash of only Rs.1,000/on hand, the prosecution has led sufficient evidence to show that the accused has committed an offence punishable under Sec.408 of I.P.Code with respect to cash of Rs.46,907-39 Ps. He has further argued that looking to the judgment of the learned Appellate Judge, in no case it can be said that the judgment is incorrect, illegal or perverse, and therefore, lastly he has prayed that this Criminal Revision Application be dismissed.

10. As per evidence of the prosecution, resolution No.30 from the Minutes Book of the Mandali has been produced at Ex.34 and as per that resolution, it was decided that the Secretary was authorised to keep on hand the cash balance of the Mandali, but that too, limited for Rs.1000/- only. It is resolved in that resolution that the Secretary of the Mandali was responsible for the cash balance of the Mandali. As per the evidence of the complainant, at the relevant point of time, the present accused was the Secretary and one Ishwarbhai K.Patel was the Chairman of that Mandali. The complainant has deposed that it was the duty of the accused to keep and maintain books of account of the Mandali, and accordingly, the accused was writing the books of account of the Mandali since about 10 years before the date of the complaint, and therefore, the books of account as well as cash balance of the Mandali were remaining in custody of the accused. To decide as to whether the accused has dishonest intention or not, there cannot be any direct evidence with regard to mental phenomenon of the accused, because it pertains to mental faculty of the accused. Whatever in the mind of the accused when he made entries in the books of account can be said to be intention of accused. Relevant entries are at Exs.18 and 20. Considering the facts and circumstances of the case, one has to carefully consider the evidence led by the

prosecution so that it can be decided as to whether the accused had dishonest intention to make use of Rs.46,907-39 ps. for his own use. That circumstances can be summarized as follows:-

(i) Since long before, the accused was in charge of the books of account as well as cash balance of the Mandali as per Resolution No.30 Ex.34. He was well aware that in his capacity as the Secretary, he cannot keep a cash balance of more than Rs.1,000/- on his hand, and if he has received cash balance of more than Rs.1,000/-, then it was his duty to credit that amount in the Bank in the account of the Mandali. Inspite of the fact that there was a clear cut resolution No.30 Ex.34, as on 29th September 1984, the accused had cash balance of more than Rs.1,000/on his hand. For the first time, on 29/9/1984, he debited Rs.46,907-39 Ps. in Cash Book/ Rojmel of the Mandali. Relevant entry is at Ex.18.

(ii) If we read that entry at Ex.18 which we find it on Page 64 of Cash Book of the Mandali, we find that the accused in his hand writing debited an amount of Rs.46,907-39 Ps. in the account in his own name stating that said amount has been used by him for his household expenditures, and therefore, on that day, i.e. on 29th September, 1984, he has debited that amount in his account. Said entry Ex.18 has been posted in Ledger Book of the Mandali. There is an account in the name of the present accused on Page 371 which is produced at Ex.20, and as per that account, a sum of Rs.46,907-39 Ps. was debited in his account as on 29th September, 1984. If we scrutinize this account Ex.20, it transpires that before 29th September, 1984, there was no account in the name of the accused in Ledger of Mandli, but for the first time, the account in the name of the accused was opened in Ledger Book of the Mandali. Out of three entries in this Account Ex.20, first entry is relating to Rs.46,907-39 Ps. and subsequent, two other entries were made showing credit of Rs.2400/- on 23/11/1984 and Rs.5,000/on 24/11/1984.

(iii) The accused was knowing that the cash balance which, he was having with him, was of the ownership of the Mandali, and the Mandali by passing a resolution No.30 (Ex.34), entrusted the work relating to keeping of cash balance on hand,

to the accused, and therefore, the cash balance which he was having with him, was not his property. It appears from the text of entry Ex.18 which he made in the Cash Book of the Mandali that before 29th September, 1984 he had utilised certain amounts for his own use, and till 28th September, 1984 he had used the amount of cash balance with him for his own use as he has used the words "AAJROJ MARA KHATE UDHAREL CHHE" (English version to the effect is "amount has been debited in my account today"). He did not seek any body's permission to debit the said amount in his account. It is an admitted fact that the inspection of books of account was taken place, on 11/10/1984. Generally, it happens that an intimation with regard to inspection is being given in advance to the institution before one month, and therefore, in this case, such an intimation must have been given by the Inspecting Officer on or about 11/9/1984. On or after 11/9/1984, the accused must be in dilemma that by 28th September, 1984, he had utilised different amounts of Mandli -total amounting to Rs.46,907-39 Ps. for his own use, and therefore, he must have found that during the inspection, this misapproprition will be noticed by the Inspecting Officer, and therefore, on 29th September, 1984, the accused debited the said amount in his own name and on 29th September, 1984, after making entry Ex.18, no cash balance had remained with him, meaning thereby that before 29th September, 1984, he had shown the cash balance of Rs.46,907-39 Ps. on his own hand with him, and after making entry Ex.18 in Cash Book, there remained no cash balance on hand with him. Thus, it is crystal clear that before 29th September, 1984, whatever cash had remained with the accused, was shown as cash on hand with him, but that cash had already been utilised by him for his own use. Simultaneously, he posted that entry Ex.18 in his own account at Ex.20 which was opened for the first time in the books of account of the Mandali. There cannot be any individual accounts of the Chairman or the Secretary in their individual own names with the Mandali. The Secretary was an employed employee and naturally every month, he was being paid the salary and that salary was being debited in Salary Account. Under the circumstances, there cannot be any separate and individual account of the Secretary in his individual name. These only two entries

at Exs.18 and 20 clearly prove that the accused had an intention of causing wrongful gain for himself and wrongful loss to the Mandali, and if this is done knowingly, then it can be said that he did that act dishonestly. I have discussed the definitions of "wrongful gain, "wrongful loss", "gaining wrongfully" and losing wrongfully" hereinabove. and looking to that definitions, it is crystal clear that the accused had an intention to cause wrongful loss to the Mandali by utilising the property of the Mandali for his own use.

11. In case of KRISHAN KUMAR VS. UNION OF INDIA, reported in AIR 1959 SC 1390, the expression "wrongful gain includes wrongful retention and wrongful loss includes being kept out the property as well as being wrongfully deprived of property".

12. Here in this case, the cash balance more than Rs.1,000/- was remaining with the accused and all that amounts which he had with him on his hand were utilised by him before 28th September, 1984, and therefore, till 29th September, 1984, he had wrongfully retained a sum of Rs.46,907-39 Ps. with him, and thereby the Mandali was kept out of and deprived of that cash balance because by 28th September, 1984, the accused had already utilised that amount for his own use. It can also be said that the Mandali was wrongfully deprived of the said amount for the period upto 28th September, 1984 because that cash balance was not in fact in the cash-box of the Mandali, but the same was already utilised by the accused, previously. It is pertinent to note that on 29th September, 1984, not a single paise remained in cash on hand as balance with the accused. Even not a single paise of the Mandali remained in cash on hand with accused, and therefore, the entire amount of Rs.46,907-39 Ps. was utilised by the accused himself before 29th September, 1984, and by making an entry Ex.18, the cash of the Mandali was shown as Nil amount. Thus the prosecution has led sufficient and cogent evidence to show that the accused had a dishonest intention to utilise that amount for his own use.

13. The prosecution has also put much emphasis on the statement Ex.21 of the accused recorded on 11/10/1984 by the complainant who inspected the books of account of the Mandali. After appreciating the evidence of the complainant who recorded the statement Ex.21, and other evidence on record, both the courts below have come to a definite, concurrent and consistent conclusion that the

statement Ex.21 is a voluntary statement made by the accused and that statement is admissible in evidence. Shri P.K.Jani, the learned advocate for the revision petitioner has not canvassed any argument on this statement Ex.21 of accused. If we read the said statement Ex.21, we find that on 11/10/1984 the day on which the complainant inspected the books of account, interrogated the accused and asked certain questions and immediately on replies being given by accused, the complainant recorded the statement of the accused. The accused has stated in his statement Ex. 21 that since 10 years before 11/10/1984, he is serving as the Secretary of the Mandali. He has also stated in his statement that all the liabilities and responsibilities with regard to cash were of him; and that on 29/9/1984, he debited an amount of Rs.46,907-39 Ps. He has also admitted in his statement that the said amount has been retained by him for his own household expenditures. He has also stated that he was fully understanding that to utilise the money of the Mandali for his own household expenditures was an offence and he undertakes to return the said amount within 15 days, and therefore, entry Ex.18 in Cash Book and entry at Ex.20 in Ledger Book of the Mandali get corroboration from his voluntary statement Ex.21, and therefore, when there is consistent and concurrent findings of fact of both the courts below, with regard to dishonest intention of the accused for utilising the said amount of the Mandali for his own use, this court finds no material to come to a different conclusion. The prosecution has ably proved the case beyond reasonable doubt.

14. During the course of arguments, Shri P.K.Jani, learned advocate for the revision petitioner has cited certain authorities. They are as follows:-

(i) In RE GANISETTI VENKANNA, reported in AIR 1958 ANDHRA PRADESH, P. 765. It is held in that case as under:-

" The essential ingredient of S.408, I.P.C. is dishonest misappropriation. The onus of the general issue i.e. dishonest misappropration lies on the prosecution, and in the absence of any evidence of dishonesty the accused is entitled to acquittal".

There cannot be any dispute with regard to the principles laid down in the aforesaid cited case. In that case, the accused had come forward with a plea which relates to settlement of accounts, and where the

prosecution had not produced any evidence whatsoevr with regard to misappropriation. So in that case, the prosecution was relying only on a plea of the accused that he had settled the accounts. Here in this case, over & above entries Exs.18 and 20 made in the books of account of the Mandali, there is a voluntary statement of the accused at Ex.21, and there is no reason to discard that statement Ex.21, and therefore, the facts and circumstances of this case are totally different than that of the cited case.

15. In the case of KRISHNA KUMAR VS. UNION OF INDIA, reported in AIR 1959 SUPREME COURT, 1390, the Hon'ble Supreme Court has explained what is wrongful gain and what is wrongful loss. In that cited case, it has been held as under:

> "In the case of a servant charged with misappropriating the goods of his master the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so".

16. Here in this case, the Mandali had entrusted the cash balance of the Mandali to the accused, and as per resolution No.30, Ex.34, the accused was under a duty to keep and maintain account of his master, but he has not done so, and thus this authority is rather helpful to the prosecution because it has been observed in this case that the question is one of intention, and not the matter of direct proof, but giving a false account of what he had done with the goods received by him, may be treated as a strong circumstance against the accused person, and therefore, as said earlier, there cannot be any direct evidence on the point of intention. The accused misappropriated an amount of Rs.46,907-39 Ps. till 28th September, 1984 and on 29th September, 1984 he debited the entire amount which ought to have remained as cash on hand with him in his own account, as if the Mandali had permitted him to draw that amount from the account of the Mandali, and therefore, this is a strong circumstance against the accused for establishing his dishonest intention.

17. Shri P.K.Jani, the learned advocate for the revision petitioner has relied on the third decision in a case of ABDUL MAJID MIAN VS. EMPEROR, reported in AIR 1936 CALCUTTA P. 520. In this case, an employee of a zamindar furnished certain amount as security. At the

time of leaving his service he handed over the account papers to his master. One item of expenditure shown in the account papers was the item withdrawn by him being the money that he had put in as security for his service. The court held in that case as under-

" In such case dishonest intention could not be made out on the part of the employee. It might be that he took a wrong view of his civil rights in taking away the amount due as his security; but he believed that he had the right on giving up his service. Hence he could not be convicted under Sec.408."

In that cited case, dishonest intention could not be made out on the part of an employee because what he withdrew from his employer was his amount which was deposited as security and therefore, he was entitled to get back that amount on leaving the service, and therefore, naturally it cannot be said that he had dishonest intention.

18. Mr.Jani has further relied on the case of DADARAO VS. THE STATE OF MAHARASHTRA, reported in AIR 1974 SUPREME COURT P. 388, it has been held as under-

" Entries in books of account without any oral evidence as to the nature of business and mode of keeping accounts are not sufficient to prove the entrustment ".

19. Here in this case, on the point of entrustment, the prosecution has produced a resolution No.30 (Ex.34). The accused himself admitted that all the responsibilities and liabilities with regard to cash balance of the Mandali were of his own responsibilities and liabilities, and therefore, this is not a case that the prosecution relies only on two documents (Ex.18 and Ex.20). When that evidence gets corroboration from the voluntary statement made by the accused which is at Ex.21, this cited authority will not be applicable to the defence, and therefore, the arguments advanced by Mr. P.K.Jani that the prosecution has not proved dishonest intention on the part of the accused which prima facie requires to be rejected, are not acceptable looking to the facts and circumstances of the present case.

20. Before parting with the arguments, Shri P.K.Jani submitted that in this case, if this court comes to a conclusion that this Criminal Revision Application is

liable to be dismissed, then the accused be given a benefit of probation under Sec.360 of Cr.P.C. On the point of quantum of sentence, the accused was heard by the learned Magistrate. There is also discussion with regard to imposition of sentence in Para 18 of the Judgment of the trial court. The accused had prayed for mercy. It is well settled principles of law that what could be the sentence is a discretion of the learned Magistrate who actually tried the case. Here in this case, the learned Magistrate has considered all aspects of the matter and after giving reasons, he refused to accept the plea of the accused to show mercy to him, and ultimately, in exercise of discretionary powers, the learned Magistrate inflicted the sentence to undergo Rigorous Imprisonment of one year and to pay a fine of Rs.5,000/-. It may be noted that prayer for giving benefit of probation was not made to the learned Appellate Judge.

21. Looking to the nature of offence and involvement of huge amount i.e. Rs.46,907-39 Ps. of the Mandali, this court is of the opinion that this is not a fit case to give benefit of probation to the accused. It may be noted that the accused was a Secretary of Sokhada Seva Sahakari Mandali Limited in which villagers had deposited their earnings after putting their hard labour and accused being an employee of that Mandali, misappropriated the money of somany members of the Mandali. Now-a-days, when cases of this nature are being lodged practically, every day, no mercy should be shown to the accused. Now-a-days, it is a modus operandi to become a rich and richer person within no time without putting any labour, and therefore, there should be some example to the society that in this type of cases, the courts do not show leniency and indirectly this would be a check on an employee of such Mandalis. This will prevent future embezzlement by employee in such type of Mandalis and Institutions, and therefore, this court is of the view that quantum of sentence inflicted by the trial court is just and reasonable one. It cannot be said to be a harsh sentence, and therefore, this court is of the opinion that it is not case for giving benefit of probation to the accused.

23. Except above contentions, no other arguments were advanced by Shri P.K.Jani.

24. In view of what is observed hereinabove and for the reasons discussed hereinabove, there is no substance in this Criminal Revision Application and this Criminal Revision Application is devoid of merits and it is liable

to be dismissed and accordingly it is dismissed. Rule is discharged. Interim relief, if any, granted earlier, stands vacated. The accused is directed to surrender before the trial court to serve out the sentence within one month from the date of this order.

Office is directed to send the writ of this order to the trial court forth with.

Date: 18/08/2000. (H.H.MEHTA,J.)

24. Immediately after pronouncing aforesaid Judgment, Shri P.K.Jani, the learned advocate for the revision -petitioner submits that the petitioner wants to approach Superior Court to challenge this Judgment, and therefore, the Judgment which is pronounced to-day, be suspended for six weeks to enable the petitioner to move the Superior Court. The order directing the revision -petitioner to surrender before the trial court to serve out the sentence within one month is suspended for six weeks from the date of this order.

Date:18/8/2000. (H.H.MEHTA,J.)
ccshah